LEGAL UPDATE

LEGISLATION UPDATE

27 November 2014

AMENDMENTS TO THE COMPANIES ACT: (1) MULTIPLE-VOTE SHARES AND NON-VOTING SHARES; (2) ELECTRONIC REGISTER OF MEMBERS

INTRODUCTION

The Companies (Amendment) Bill (No. 25/2014) was passed by Parliament on 8 October 2014 and will come into effect on a date to be gazetted ("**Amendment Act**"). It implements a wide range of amendments to the Singapore Companies Act (Chapter 50) ("**Companies Act**") recommended in the Companies Act Review Steering Committee Report as accepted by the Ministry of Finance in October 2012.

This article forms part of a series of Legal Updates relating to the Amendment Act and discusses two of the significant changes to the Companies Act, which are:

(a) to allow public companies to issue multiple- vote equity shares and non-voting shares; and

(b) to implement the electronic online register of members of private companies.

MULTIPLE-VOTE SHARES AND NON-VOTING SHARES

Current position in the Companies Act

The Companies Act currently provides that each equity share issued by a public company limited by shares is entitled to one vote, and one vote only: (see section 64(1) and (5) of the Companies Act). The exception to this rule is if the equity share is a management share issued by a newspaper company under section 10 of the Newspaper and Printing Presses Act (Chapter 206).

Proposed amendment

The Steering Committee recommended that the Companies Act be amended to allow for multiple-vote shares and non-voting shares for equity shares in public companies limited by shares. In doing so, the Steering Committee explained that the rationale was that multiple-vote shares and non-voting shares would allow such companies greater flexibility in capital management.

The contrary view is that treating all shareholders equally in respect of voting rights is fundamental for good corporate governance and minority protection rights. In particular, in the Asian context, one or two large shareholders might control a company, and allowing multiple-vote shares and non-voting shares could undermine minority interests. The Steering Committee was of the opinion however that such objections could be addressed by necessary safeguards and restrictions.

In accepting the Steering Committee's recommendation, the Ministry of Finance ("**MOF**") agreed with the view of supporters of the proposal. The MOF also noted that implementing the recommendation will align Singapore law with that of the US, UK, New Zealand and Australia, which allow companies to issue classes of shares with different voting rights (subject to companies' articles).

In connection with the proposal, the MOF stipulated that certain safeguards are to be introduced, which have been implemented in the Amendment Act:

(a) Shareholders must approve the issuance of shares with different voting rights to a higher approval threshold via a special resolution;

(b) Information on the voting rights for each class of shares must accompany the notice of meeting at which a resolution is proposed to be passed;

(c) Companies must specify the rights for different classes of shares in their Articles and clearly demarcate the different classes of shares so that the shareholders know the rights attached to any particular class of shares; and

(d) Holders of non-voting shares will have equal voting rights on resolutions to wind up the company or on those that vary the rights of non-voting shares.

The first three safeguards can be categorised as "informed consent" requirements. If the shareholders of a company consider the implications of issuing multiple-vote shares or non-voting shares, and decide that it will be in their interests to issue such shares, then they are considered to have accepted both the benefits and the drawbacks of such a structure.

The fourth safeguard can be categorised as a "protective" requirement. A non-voting shareholder is to have certain basic rights which cannot be removed. This safeguard is designed to mitigate the risks that non-voting shareholding interests in a company could be undermined as a result of having holders of multiple-vote shares.

In respect of public listed companies, the MOF and the Monetary Authority of Singapore ("**MAS**") recognised that dual class share structures may give rise to issues pertaining to entrenchment of control. They have, however, deferred any recommendations relating to these problems in favour of an assessment to be made by the Singapore Exchange ("**SGX**") and the MAS on two matters. Firstly, whether listed companies with a dual class share structure should be allowed. Secondly, whether listed companies should be allowed to issue multiple-vote shares and non-voting shares.

If the SGX allows dual class share structures as well as multiple-vote shares and non-voting shares, Singapore's attractiveness as a listing destination may be enhanced. For example, it was reported last year that China's largest e-commerce company, Alibaba Group Holdings Ltd.'s talks for a Hong Kong listing broke down as Hong Kong does not allow dual voting classes on new listings. Alibaba was listed on the New York Stock Exchange instead this year in one of the largest global initial public offerings.

However, the flip side of such an arrangement is that public shareholders' interests may be undermined, making an investment in such a company less attractive. Further, the experience in the United States in respect of dual-class stocks has shown that such structures may not perform as well as traditional arrangements. The rationale of American companies using dual-class structures is that executives can look after the long-term interests of their companies without the pressures of the public market. However, the problem with such a structure is that shareholders' voice of dissent is locked out. In addition, the threat of a takeover of a poorly governed company which is owned by many shareholders may not be available if shareholder-executives entrench themselves using dual-class structures.

Further details of listing of dual class share structures would have to await the release of the SGX consultation paper on the same. However, if the main reason for allowing such listing is to attract important high profile companies similar to Alibaba to list in Singapore, perhaps the regulations permitting such listing should be targeted only at those companies with such important high profile features. Hence, for instance, only high tech growth companies with net profits exceeding a high threshold, say, US$1 billion and gross revenues exceeding similarly high thresholds, say US$10 billion, with good corporate governance structures in place (such as institutional investor representation and long term private equity investor representation on its board of directors and full compliance with the Corporate Governance Code) could be considered for listing. With such limitations, the risks of dual class listings affecting other companies on the Singapore stock exchange would be diminished.

ELECTRONIC REGISTER OF MEMBERS

Current position in the Companies Act

The Companies Act currently stipulates that all companies incorporated in Singapore are required to maintain a physical register of members in accordance with section 190 of the Companies Act.

Proposed amendment

The Amendment Act introduces a new division, namely, *Division 4A – Electronic register of members kept by the Registrar*, immediately after section 196 which states that the Registrar shall, in respect of every private company, keep and maintain an electronic register of members of that company containing such information notified to the Registrar on or after that date. (see new section 196A). The new section 196A also specifies the items of information that need to be maintained in such an electronic register.

Information to be provided by pre-existing private companies

The Steering Committee proposed that with respect to a private company incorporated, or converted from a public company before the commencement of relevant section 110 of the Amendment Act shall lodge with the Registrar the information necessary to be included in the company's electronic register of members under the proposed section 196A within the earlier of the following dates:

(a) 6 months after the date of commencement of section 110 of the Companies (Amendment) Act 2014 ("**Appointed Day**"); or;

(b) the date on which the first return under section 197 is required to be lodged with the Registrar after the Appointed Day.

The company is required to maintain the old register of members after such Appointed Day for a period of 7 years after the last member referred to in the old register ceases to be a member of the company.

The requirement to maintain an electronic register of members does not apply to a public company limited by shares nor to a public company limited by guarantee. Neither does it apply to a foreign corporation registered as a foreign company under the Companies Act. As SGX-listed Singapore companies must be public companies, by definition the electronic register of members do not apply to companies listed on the SGX.

When the relevant provisions of the Amendment Act are brought into effect, the electronic register maintained by the Accounting and Corporate Regulatory Authority ("**ACRA**") of Singapore will be the sole authoritative register of members such that any transfer of shares in a private company incorporated in Singapore shall not take effect until the respective electronic register of members with ACRA is updated to the effect.

An allotment of shares in a private company does not take effect until the electronic register of members of the company is updated by the Registrar under section 196A(5) after lodging with the Registrar a return of the allotment in the prescribed form.

The current Companies Act provides that the register of members shall be prima facie evidence of any matters inserted therein as required or authorised by the Companies Act (see section 190 (4)). As with entries on the existing registers of members in companies, the Amendment Act provides that an entry in the register of members required to be kept by the Registrar is prima facie evidence of the truth of any matters which are by the Companies Act directed or authorised to be entered or inserted in the register of members. (see new section 196A (6))

The power of the Court to rectify the register of members under section 194 of the Companies Act is applicable to such an electronic register of members. In addition, section 12B (1) provides that where it appears to the court, as a result of evidence adduced before it by an applicant company, that any particular recorded in a register is erroneous or defective, the court may, by order, direct the Registrar to rectify the register on such terms and conditions as seem to the court just and expedient, as are specified in the order and the Registrar shall, upon receipt of the order, rectify the register accordingly.

The rectification of the electronic register will have to be effected through ACRA and it will not be possible for the company on its own to rectify a mistake on the electronic register. This necessarily circumscribes the common law power of the company to rectify a mistake on the register of members where there is no dispute that a person's name should or should not be on the register. Section 12C (1), an officer of a company may notify the Registrar in the prescribed form of any error contained in any document relating to the company filed or lodged with the Registrar; or any error in the filing or lodgment of any document relating to the company with the Registrar. The Registrar, upon satisfaction of such grounds, will rectify the register accordingly but must not expunge any document from the register. The decision made by the Registrar on whether to rectify the register is final.

The Registrar on its own initiative may rectify the register pursuant to section 12D if the Registrar is satisfied that there is a defect or error in the particulars or document arising from any grammatical, typographical or similar mistake; or there is evidence of a conflict between the particulars of a company or person and other information in the register relating to that company or person; or other information relating to that company or person obtained from such department or Ministry of the Government, or statutory body or other body corporate as may be prescribed.

It should be noted that the Amendment Act did not elevate the electronic register of members to confer an indefeasible title on the members whose names are entered on such electronic register. It would seem that the common law rules as to priority of interests in shares would continue to apply. There appears to be no statutory compensation fund available to those who suffer loss arising from such mistaken entries. The position as regards title to shares on an electronic register is therefore not similar to that as to title in real estate registered under the Land Titles Act (Chapter 157) where there is a statutory compensation scheme available.

If a private company should subsequently convert to the status of a public company, the amended section 190 and section 191 would require the public company to maintain the register of members of such public company. Presumably the company secretary would refer to the ACRA electronic register of members of the previous private company for such information on the entries to such register of members. This would not be an unusual event as Singapore companies seeking an initial public offering of their shares on the Singapore stock exchange would necessarily have to convert to a public company status.

The introduction of such ACRA register of members for private companies would necessitate changes in existing practices and procedures in transactions involving the sale of shares in private companies. As legal title is only obtained upon the entry into the ACRA register of members through the lodgment with ACRA of the notice of transfer of shares, it is likely that the purchaser will insist on completion purchase monies being held in escrow at completion conditional upon evidence of such lodgement with ACRA of the notice of transfer of shares. A prudent purchaser may even insist on its own transactional solicitors being authorized by the private company to effect such lodgement with ACRA of the notice of transfer of shares and obtaining evidence from ACRA of such transfer of shares being entered on the ACRA register of members.

The electronic register of members will apparently not identify any particular share by its share certificate number or other serial identifying number nor be accompanied by an electronic register of transfers of shares. It is a common practice for corporate secretarial services providers to assist the company secretary of the private companies to maintain a register of transfers of shares and a register of share certificates issued as it is important in the event of dispute over the beneficial title to any particular share, to be able to identify who were the previous transferors and subsequent transferees of such particular share. Where a dispute arises over title to such share which originated from an alleged fraudulent transfer prior to several preceding transfers, and such particular share has been transferred over several owners on previous occasions who may have held such share together with other shares in the same company, it is important to be able to identify precisely which share is affected by such claim and which other shares held by the same member are not affected by such claim. It would be good practice to continue maintaining such register of transfers of shares and such register of share certificates.

As the ACRA electronic register of members of any private company is expected to accurately reflect the legal registered ownership of shares in such private company at any given moment in time, the Amendment Act makes provision for the various situations involving change in ownership of the shares including the following:

(a) buy back of ordinary shares of a private companies is currently retained by the private company as treasury shares upon such buy back being effected. The Amendment Act provides that such buy back is effective upon updating of the electronic register of members by the Registrar under section 196A (5) after lodgment with the ACRA of the notice of share buyback and specifying that such buyback shares are now treasury shares;

(b) buy back of preference shares of a private company is currently cancelled immediately upon such buy back. The Amendment Act provides that such buy back shall be effective upon updating of the electronic register of members by the Registrar under section 196A (5) after lodgment with ACRA of the notice of share buyback;

(c) redemption of shares in a private company currently takes effect upon in accordance with the provisions in the articles of association regarding such redemption, failing which, upon the passing of the relevant resolution for such redemption. Section 70 is now amended to provide that such redemption shall be effective only upon the updating of the electronic register of members of the company by the Registrar under section 196A(5) and after lodgment with ACRA of the notice of redemption of shares; and

(d) consolidation of shares in a private company and conversion of shares in a private company to stock and vice versa currently takes effect in accordance with the Articles of Association upon passing of the relevant resolution. The Amendment Act provides that such consolidation or conversion shall be effective only upon updating of the electronic register of members of the company by the Registrar under section 196A(5) and after lodgement with ACRA of the relevant notice of consolidation or conversion.

REFERENCES

Please also refer to the other articles below which form part of a series of legal updates relating to the Amendment Act:

Amendments to the Companies Act – Impact on Corporate Transactions

Amendments to the Companies Act – Power of Directors to Bind Companies

---

If you have any questions or comments on this article, please contact:

Sin Boon Ann
Deputy Managing Director, Corporate & Finance
T: +65 6531 2206
E: boonann.sin@drewnapier.com

Petrus Huang
Director, Corporate & Finance
T: +65 6531 2208
E: petrus.huang@drewnapier.com

Su Jen Jen
Director, Corporate & Finance
T: +65 6531 2215
E: jenjen.su@drewnapier.com

Yap Siew Ling
Director, Corporate & Finance
T: +65 6531 2566
E: siewling.yap@drewnapier.com

Grace Lai
Director, Corporate & Finance
T: +65 6531 4166
E: grace.lai@drewnapier.com

Mark See
Director, Corporate & Finance
T: +65 6531 2234
E: mark.see@drewnapier.com

Ron Cheng
Director, Corporate & Finance
T: +65 6531 2230
E: ron.cheng@drewnapier.com

LEGAL UPDATE

Drew & Napier LLC
10 Collyer Quay
#10-01 Ocean Financial Centre
Singapore 049315

www.drewnapier.com

T : +65 6535 0733
T : +65 9726 0573 (After Hours)
F : +65 6535 4906